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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

No. 71-7514

THE BOARD OF EDUCATION OF THE LITTLE ROCK SCHOOL DISTRICT, et al.,
Petitioners,

vs.

DELORES CLARK, et al.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Eighth Circuit

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TABLE OF CONTENTS

	Page
Prayer	1
Opinions Below	1
Jurisdiction	2
Questions Presented	2
Constitutional Provisions Involved	3
Statement	3
1. Proceedings in the District Court (Prior to 1970)	3
2. The Decision of the Court of Appeals (1970)	5
3. Proceedings in This Court (1970-1971)	6
4. Proceedings in the District Court (1970-1971)	6
5. Proceedings in the District Court (1971)	7
6. The Decision of the Court of Appeals	8
Reasons for Granting the Writ	9
Conclusion	16
Appendix I—Order of the Court of Appeals for the Eighth Circuit	A-1
Appendix II—Opinion of the Court of Appeals for the Eighth Circuit	A-3
Appendix III—Opinion of the District Court	A-15
Appendix IV—Desegregation Plan Filed in the District Court on November 1, 1971	A-41

Table of Cases

Aaron v. Cooper, 257 F.2d 33 (1958) 14

Alexander v. Holmes County Board of Education, 396 U. S. 19 (1969) 10, 12

Board of Education of The Little Rock School District v. Clark, No. 409, Oct. Term, 1970, 29 L.Ed. 2d 122 6

Brown v. Board of Education, 347 U.S. 483 (1954) .. 6

Clark v. Board of Education, 369 F.2d 661 (8th Cir. 1966) 4, 15

Clark v. Board of Education, E.D. Ark., 316 F. Supp. 1209 (1970) 6

Clark v. Board of Education of the Little Rock School District, 426 F.2d 1035 (8th Cir. 1970) 5

Davis v. Board of Education of North Little Rock, 328 F.Supp. 1197 (1971) 11, 13

Goss v. Board of Education of Knoxville, 444 F.2d 632 (1971) 14

Green v. County School Board, 391 U. S. 430 (1968) .. 4

Northcross v. Board of Education of Memphis, 397 U.S. 232 (1970) 15

Northcross v. Board of Education of Memphis, 444 F.2d 1179 (1971) 13

Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1 (1971) 6, 10, 12, 13, 14, 15, 16

Winston-Salem/Forsythe County Board of Education, No. 71-274, Oct. Term, 1971 15

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No. .....

THE BOARD OF EDUCATION OF THE LITTLE ROCK SCHOOL DISTRICT, et al.,
Petitioners,

vs.

DELORES CLARK, et al.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Eighth Circuit

Petitioners pray that a writ of certiorari issue to review the order entered August 13, 1971 and the judgment entered September 10, 1971 by the United States Court of Appeals for the Eighth Circuit.

OPINIONS BELOW

The order of the United States Court of Appeals for the Eighth Circuit entered August 13, 1971 is set forth in the Appendix, p. A-1. The opinion of that Court entered September 10, 1971 is not yet reported and is

set forth in the Appendix, p. A-3. The decision of the United States District Court for the Eastern District of Arkansas, Western Division, is reported at 328 F. Supp. 1205 (1971). It is set forth in the Appendix, p. A-15.

JURISDICTION

The order of the United States Court of Appeals for the Eighth Circuit was entered on August 13, 1971 and the judgment of that Court was entered on September 10, 1971. On November 2, 1971 Mr. Justice Blackmun signed an order extending the time for filing a petition for a writ of certiorari to and including December 9, 1971. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Where fairly drawn geographical attendance zones produce racial imbalance in some schools of a public school system due to housing patterns over which school authorities have no control, does the Constitution require a school district which historically has not had a transportation system to divert large sums from its educational program to organize and maintain a cross-busing system for the sole purpose of overcoming racial imbalance in every school?

2. Where a school district has not provided transportation for secondary students, although in the past the attendance zone of its high schools has been district-wide, does the Constitution require that such transportation be provided when attendance zones are redrawn pursuant Court order to overcome racial imbalance in the schools?

3. Where the district court has found, with record support, that "the daily hauling of students all over a large city merely to achieve racial balance in all schools is

educational nonsense," and where the record reflects many educational benefits attending the assignment of elementary students to schools near their homes, does the Constitution require busing of elementary students to schools distant from their homes in a school district that formerly maintained de jure segregation solely to overcome racial imbalance in the schools?

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States.

STATEMENT

1. Proceedings in the District Court (Prior to 1970)

Petitioners are members of the Board of Education of the Little Rock School District and its Superintendent.[1] This is a metropolitan school district which during 1970-71 operated forty-three schools for the benefit of 25,531 students.[2] At the end of that school year in which the district was operating on the neighborhood school concept with certain modifications designed to promote racial dispersal among the schools, there were 13,836 white students and 9,695 Negro students. A distinct trend in the racial consist of the student body attending the public

[1] Petitioners are the Board of Education of the Little Rock School District, Jim L. Jenkins, Dr. Bert O. Miller, Charles A. Brown, E. Kearney Dietz, T. E. Patterson, Jim P. Spradley, Dr. George P. Beene, Members thereof, and Floyd W. Parsons, Superintendent. Respondents are Delores Clark, Roosevelt Clark, June Clark, Sharon Clark, infants, by their father and next friend, Roosevelt Clark, and Ethel Lamar Moore, an infant, by her mother and next friend, Mrs. Dazzle Mott Moore.

[2] Reports filed by defendants in the District Court June 8 and June 28, 1971.

schools of this district is evident by reference to statistics in earlier phases of this litigation which reflect that in July, 1968 there were 15,063 white students and 8,050 Negro students. The acceleration of the white exodus from the public schools during the current school year is demonstrated in Appendix IV attached hereto. For the first time in the history of the district student enrollment at the first grade level is more than fifty percent (50%) black.

This school desegregation suit was originally filed on November 4, 1964 in the Eastern District of Arkansas by five Negro children and their parents who alleged a denial of equal protection of the laws arising out of the district's assignment of students pursuant to the Arkansas Pupil Assignment Law. Plaintiffs sought the adoption of a zoning system that would "generally assign all pupils to the schools nearest their residence." On January 14, 1966 the District Court, in an unreported opinion, approved a transition by the school district to a freedom of choice desegregation plan. The freedom of choice plan was approved in substance, but with minor modifications, by the Court of Appeals. **Clark v. Board of Education**, 369 F.2d 661 (8th Cir. 1966). On June 25, 1968, after this Court's May 27, 1968 decisions in **Green v. County School Board**, 391 U. S. 430 (1968), and companion cases, the plaintiffs filed a Motion for Further Relief asking, *inter alia* that the school district be required to submit a desegregation plan other than freedom of choice.

The school district thereafter filed a plan, and later revised it in accordance with suggestions in a letter from the District Court, which comprehended a major reassignment of faculty to increase racial dispersal among the schools, and which generally provided that all students would be assigned to school on the basis of geographic attendance zones for elementary, junior high and senior

high schools. All students would attend the school designated for the zone in which they resided with certain minor exceptions.

After an extensive trial the District Court, in an unpublished opinion filed May 8, 1969, approved the faculty desegregation plan and with certain modifications designed to promote racial dispersal of the students among the schools approved the neighborhood concept of student assignment proposed by the school district.

2. The decision of the Court of Appeals (1970)

The plaintiffs appealed, urging that the geographic attendance zone plan based on the neighborhood school concept failed to achieve a unitary system, and that the faculty assignment plan was inadequate to eliminate the racial identity of certain schools. The school district cross-appealed from the portions of the District Court's Order which imposed certain artificial devices to promote racial dispersal of the students. The Court of Appeals *en banc*[3] (two Judges dissenting) reversed and remanded the District Court's Order insofar as it approved the geographic attendance zone assignment plan but affirmed as to the faculty desegregation plan. The Court of Appeals based its disapproval of the student assignment plan on the fact that several schools in the district remained "racially identifiable" because of the heavy predominance of students of one race and the conclusion that alternative means of pupil assignment were available to the district to achieve "more effective desegregation." **Clark v. Board of Education of the Little Rock School District**, 426 F.2d 1035 (8th Cir. 1970).

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[3] Judge Mehaffy has not participated in either of the *en banc* hearings of this case in the Court of Appeals. Prior to his appointment to the bench he was a member of the law firm representing the school district.

Chief Judge Van Oosterhout and Judge Gibson dissented, finding that "(E)verything has been done that could be done short of abandonment of the neighborhood school system . . ."; that the desegregation process in the district was no longer impeded by state action; that this Court had not decided that racial balance was required in all schools of a metropolitan school district; and that geographic attendance zones fairly drawn without racial discrimination should meet the constitutional standards of **Brown v. Board of Education**, 347 U.S. 483 (1954), and subsequent decisions of this Court.

3. Proceedings in this Court (1970-1971)

The school district filed a petition for writ of certiorari in this Court in July, 1970. That petition pended in this Court for about ten months until May 3, 1971 when it was denied. **Board of Education of The Little Rock School District v. Clark**, No. 409, Oct. Term, 1970, 29 L.Ed. 2d 122.

4. Proceedings in the District Court (1970-1971)

In the meantime, on remand the District Court required the school district during 1970-71 to revise the method of student assignment to its junior high schools and senior high schools, again in order to increase racial dispersal among the schools, but permitted the assignment of elementary students to continue on the basis of neighborhood zones. See **Clark v. Board of Education**, E.D. Ark., 316 F. Supp. 1209 (1970). Appeals from these Orders were pending in the Court of Appeals when this Court published its opinions in **Swann v. Charlotte-Mecklenburg Board of Education**, 402 U.S. 1 (1971), and the related cases. On May 4, 1971 the Court of Appeals remanded this case to the District Court for further consideration in light of those opinions.

5. Proceedings in the District Court (1971)

Following this remand the District Court required the school district to prepare yet another desegregation plan. This was filed on June 8, 1971 and provided for an abandonment of the district's historical 6-3-3 grade structure and the adoption of a 5-3-2-2 grade structure in order to produce substantial racial balance in every secondary school except one. The sixth grade was removed from the elementary schools, and it was proposed to continue to operate these schools on a neighborhood assignment plan and to increase the amount of integration in them by closing several. The school district proposed to provide transportation for students in grades 9 through 12 only in instances of "extreme hardship". Students in grades 1 through 8 who lived more than two miles from the school to which they were assigned and who were assigned to a school more distant from their residence than another school serving the same grade level were to be eligible for transportation assistance to be arranged by the district. A majority to minority transfer right was provided with space guaranteed in the selected school and with transportation provided by the school district.

Following a three day hearing concerning this plan the District Court announced that it would be unacceptable because of the disproportionate concentration of black students in one "middle school" (grades 6, 7 and 8) and directed submission of an alternative. On June 28, 1971 the school district responded with two alternative plans which complied with the court's directive, but both of which involved assignment of many more students to schools distant from their homes than the earlier plan.

On July 10, 1971 the District Court entered its Decree and Opinion which (1) approved the elementary plan for grades 1 through 5 for 1971-72; (2) directed that the district would be required to submit a plan for operation

of the elementary schools in 1972-73 in such manner that "... no elementary school can be identified as a school primarily intended or used for the education of students of any particular race" and to provide such transportation as would be necessitated by the plan; (3) disapproved the original 5-3-2-2 plan and ordered the district to implement the alternate plan providing for a grade structure of 5-2-2-3 and (4) ordered the school district to provide transportation in 1971-72 for all students in grades 6 through 12 who are assigned to schools located more than two miles from their homes.

6. The Decision of the Court of Appeals

Both sides appealed. The position of plaintiffs was essentially that the school district should be ordered to place into effect a plan proposed by plaintiffs that would produce racial balance in all of the schools by massive cross-town busing of students. Historically, this school district has not provided student transportation, has never owned a fleet of buses, and at the time of trial owned only one special-purpose bus used to transport orthopedically handicapped children.

The basic position of the school district on appeal was that the District Court erred (1) in ordering the implementation of a massive pupil transportation plan for racially balancing the elementary schools in 1972-73, (2) in rejecting the initial plan proposed by the school authorities solely because it would produce one school with a heavy concentration of black students and (3) in requiring the school district to provide transportation for students in grades 6 through 12.

In an opinion published September 10, 1971[4] the Court of Appeals affirmed the plan ordered by the District Court

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[4] Appendix II hereto.

with regard to the secondary schools except that it reduced slightly the classification of secondary students for whom the school district must provide transportation and remanded the case with directions that a plan for the establishment of a "unitary" system of elementary schools be devised, that it be implemented to the extent possible during the current school year, and that it be fully implemented at the beginning of the 1972-3 school year.

The Court of Appeals directed that its mandate be issued forthwith. Accordingly the District Court required the school district to file on November 1, 1971 a new plan for student assignment in the elementary schools. This plan, attached as Appendix IV was submitted in obedience to the Court's Order but the school board expressly withheld adoption or approval of it.

REASONS FOR GRANTING THE WRIT

As evidenced in the foregoing Statement, for the past several years the Little Rock School District has been subjected to the annual agony of reorganizing its public school system to comply with the everchanging orders of the Court of Appeals and the District Court. Each renewal of this litigation—initiated by applications by plaintiffs "for further relief"—has demonstrated disagreement between those two Courts as to the applicable constitutional principles. Since 1968 the district has been required by orders of the courts below to convert—in successive traumatic wrenches—from a neighborhood system of school assignment (then almost universally regarded to pass constitutional muster) to the present educational absurdity whereby the high schools (grades 10-12), junior high schools (grades 8-9) and middle schools (grades 6-7) are racially "balanced" by cross-busing thousands of children to schools remote from their homes.

The result has been a devastating impact on the educational program. In the pattern being experienced by metropolitan school districts across the nation, those with sufficient affluence to do so are abandoning the public schools, essential public support is being withdrawn, and large sums are being diverted from needed educational purposes to support a hastily organized busing system opposed by the vast majority of the community of both races.

All of this, and now this school district is exposed to yet another court mandated reorganization that would require the massive cross-busing of the elementary students in order to eliminate all "racially identifiable" schools at that level. The current efforts of defendants to comply with that order, submitted respectfully but under protest on November 1, 1971, are reflected at Appendix IV.

It is submitted that this unhappy state of affairs—tragic for the community and the children of both races—is the result of misreading and misapplication of this Court's teachings in **Alexander v. Holmes County Board of Education**, 396 U. S. 19 (1969) and **Swann v. Charlotte-Mecklenburg Board of Education**, 402 U.S. 1 (1971) by both courts below.

The District Court correctly, and with ample record support, observed:

> "The Court recognizes at the start that the whole idea of busing, particularly at the elementary grade levels and involving young children, is repugnant to the white patrons of the District as a class, and that their repugnance is shared by many if not most of the black patrons of the District. Parents of young children, whether black or white, simply do not like to have the children hauled long distances day after day merely to achieve racial balance in the schools." 328 F.Supp. 1205, 1215.

Judge Henley then noted his own often expressed opposition to busing for that purpose but declared that he must adhere to his "reluctant prediction" made in **Davis v. Board of Education of North Little Rock**, 328 F.Supp. 1197 (1971). In that decision he had said at page 1203 "* * * the daily hauling of students all over a large city merely to achieve racial balance in all schools is educational nonsense." However, based on his prediction of what the federal appellate courts would require **in the future** he directed the adoption of a plan requiring massive cross-busing of elementary students. That prediction, at page 1204 of **Davis**, *supra*, was:

> "In view of the consistent course of judicial decisions in recent years in integration cases, a course frequently characterized by a tendency of appellate courts to order more than the trial courts have ordered but without saying how much more, the Court thinks that it is certainly predictable, and the Court will reluctantly predict, that sooner or later the federal appellate courts are going to hold that the Constitution requires busing in school districts in which busing is the only means of eliminating racially identifiable schools."

This prediction proved accurate with respect to the subsequent decision of the Court of Appeals review of which is sought here. However, it is in square conflict with the applicable existing decisions of this Court.

We don't have here a District Court formulating a remedy for racially concentrated residential patterns it has found to have resulted from governmental action. Judge Henley characterized housing patterns in Little Rock to be "de facto segregated". 328 F.Supp. 1205, 1208. The late District Judge Gordon E. Young who presided at the 1968 trial of this case held in his opinion filed May 8, 1969:

> "We have no doubt that the growth of Little Rock and its School District would have been the same without regard to so-called de facto or de jure segregation."

That finding was based on ample evidence and was not reversed by the Court of Appeals.

Here we have a District Court requiring a school district with no buses to assume the enormous expense of cross-busing thousands of children daily all over the city based upon its prediction that ultimately it would be required by this Court. The District Court so acted notwithstanding a record which established that this school district was in full compliance with the constitutional duty defined in **Alexander**, *supra*, to operate "school systems within which no person is to be effectively excluded from any school because of race or color," save only for some racial classifications designed to promote racial dispersal among the schools and expressly required by prior orders of the District Court and Court of Appeals.

Under **Swann**, the initial inquiry in school desegregation cases is whether the existence of racially imbalanced public school enrollments is attributable to de facto or de jure conditions. It is submitted that since the District Court concluded that de facto housing patterns produced the imbalance in the public schools in Little Rock that should have concluded the matter under **Swann**. However, the District Court did precisely what this Court said in **Swann** would be error. Solely because of the racial imbalance in the schools produced by de facto housing patterns it required extreme and bizarre measures to eliminate the "racial identifiability" of every school in the system. Since plaintiffs urge, and apparently the courts below accept the proposition, that a school is "racially identifiable" if its racial allocation of students materially differs from that of the district as

a whole, this is but another expression of the concept of racial balance.

The Court of Appeals affirmed the district court's mandate for cross-busing of children at all grade levels to eliminate the "racial identifiability" of all the schools in the system based on its interpretation of **Swann** and related cases. In so doing it is in square disagreement pertaining to the teachings of those decisions with the Court of Appeals for the Sixth Circuit. In **Northcross v. Board of Education of Memphis**, 444 F.2d 1179 (1971) that Court said:

> "The facts in the present appeals are much different from those in **Swann** and **Davis.**
>
> * * * * * * * *
>
> It has been the practice of the Board of Education to locate schools in areas where the children live. The Board of Education disclaimed responsibility for the residential patterns of the City, claiming that they are caused by economic conditions, over which the Board has no control.
>
> * * * * * * * *
>
> In certain areas, there has been a flight of the white population. It has not been suggested that the Board can stop that flight, or that it should chase after them. Nor can the Board very well control the mobility of Negro population."
>
> "With respect to providing transportation for pupils, the District Court stated:
>
> 'Historically the defendant system has never furnished transportation to and from schools for its pupils, except in unusual situations, such as to avoid isolated hazardous situations for small pupils. Some 5,000 to 6,000 pupils do use public transportation operated by the municipally owned Memphis Transit Authority over its regularly scheduled routes. Stu-

dents are allowed to ride at certain hours for reduced fare.' 312 F. Supp. 1154.

The present case may be distinguished from **Swann** in that extensive busing previously had been provided in connection with the regular operation of Swann's school system. The Board in **Swann** had totally defaulted in its duty to submit an acceptable plan, and adopted an arbitrary attitude.

We do not read **Swann** and **Davis** as requiring the District Court to order the Board to provide extensive transportation of pupils to schools all over the City, regardless of distances involved, in order to establish a fixed ratio in each school."

See also the opinion of the Court of Appeals for the Sixth Circuit in **Goss v. Board of Education of Knoxville**, 444 F.2d 632 (1971), in which it is pointed out that the opinions of Judge McMillan whose Decree was ultimately affirmed by this Court in **Swann** expressed his pique with the conduct of the school authorities, and accordingly the broadness of his commands suggested a motivation of reprisal. There are no parallel circumstances in the case at bar and there is no suggestion in the opinion of the District Court of bad faith on the part of these defendants. Indeed, the defendants, and their predecessors, have been commended by the Court of Appeals for their good faith in attempting to discharge a civic responsibility in the most trying circumstances during the long history of this litigation. See **Aaron v. Cooper**,[5] 257 F.2d 33 (1958) and

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[5] "This Court recognizes that, following the first Brown decision, the members of the Board, acting in good faith, and working with the Superintendent of Schools, moved promptly to promulgate a plan designed to gradually bring about complete integration in the Little Rock public schools, and they are to be commended for their efforts in that regard.

* * * * * * * *

While it may appear to the members of the Board and the Superintendent that they have a thankless task, they may be

Clark v. Board of Education of Little Rock,[6] 369 F.2d 661 (1966).

No purpose would be served by urging at length the public importance of this and other school desegregation cases. The monumental impact of court decisions pertaining to the operations of public school systems is daily described on the pages of every newspaper in America.

The Chief Justice noted in his concurring opinion in **Northcross v. Board of Education of Memphis,** 397 U.S. 232 (1970), the need for clearing up the confusion resulting from the Court's prior school desegregation decisions: School authorities, judges and lawyers confronted with their respective responsibilities in the field of school desegregation hoped that **Swann** would serve this purpose. However, as the Chief Justice had occasion to note as recently as August 31, 1971, in his opinion as Circuit Justice in **Winston-Salem/Forsythe County Board of Education,** No. 71-274, Oct. Term, 1971:

> "The Board's resolution reciting that it was adopting the revised plan under protest, on an understanding that it was **required** to achieve a fixed 'racial balance' that reflected the total composition of the school district is disturbing. It suggests the possibility that there may be some misreading of the opinion of the Court in the **Swann** case. If the Court of Appeals or the District Court read this Court's opinions as requiring a fixed racial balance or quota,

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recompensed by the knowledge that throughout, they, as public officers, have recognized their duty to support the Constitution of the United States, and to respect the laws and courts of our Federal Government, and our democratic ideals, regardless of their personal convictions with respect to the wisdom of school integration."

[6] "Many of the problems encountered are not of the Board's making or choosing and, we believe, the Board has evidenced a genuine desire to follow the commands of **Brown** case to ultimately place into effect a non-racially operated school system."

they would appear to have overlooked specific language of the opinion in the **Swann** case to the contrary."

The confusion and uncertainty in this field of constitutional law is costly in terms of tax money raised and appropriated to educate the nation's children, and in terms of impairment of educational programs in school systems kept in constant disruption and change by a succession of court orders. The public interest would be served by settlement of these constitutional questions at the earliest possible time and this case is an appropriate vehicle for that purpose.

The courts below have misread and misapplied a constitutional interpretation of this Court in a matter of great public importance and the lower federal courts are in conflict as to the correct interpretation of this Court's decision in **Swann**. For these reasons we urge that the writ should be granted.

CONCLUSION

For the foregoing reasons it is submitted that the petition for certiorari should be granted to review the order entered August 13, 1971, and the judgment entered September 10, 1971, by the United States Court of Appeals for the Eighth Circuit.

Respectfully submitted

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December 7, 1971

APPENDIX

APPENDIX I

United States Court of Appeals
For the Eighth Circuit

No. 71-1409
No. 71-1415

Delores Clark, et al.,
Appellants,
v.
The Board of Education of the Little Rock School District, et al.,
Appellees.

On Appeal from the United States District Court for the Eastern District of Arkansas

ORDER

(Filed August 13, 1971)

1. The decision of the district court insofar as it relates to grades 6 through 12 is affirmed.

2. The decision of the district court insofar as it permits the Board of Education to proceed with construction at Henderson School is affirmed.

3. The decision of the district court with respect to grades 1 through 5 is affirmed insofar as it permits these grades to open on August 30, 1971, in accordance with paragraph 2 of the court's decree. This court will file an opinion in the near future which will modify in some degree the court's order with respect to these grades.

4. The decision of the district court insofar as it requires the School District to furnish transportation to all students in grades 6 through 12 who live more than two miles from the school to which they are assigned is reversed and the Board of Education is required to furnish transportation to only those students in those grades who are assigned to a school other than that which is closest to their home.

5. This court reserves its decision on all other issues presented to it for decision and will file an opinion as to those issues at a subsequent time.

August 13, 1971

APPENDIX II

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 71-1409
No. 71-1415

Delores Clark, et al.,
Appellants,
v.
Board of Education of the Little Rock School District, et al.,
Appellees.
and Cross-Appeal.

Appeals from the United States District Court for the Eastern District of Arkansas.

[September 10, 1971.]

Before MATTHES, Chief Judge; GIBSON, LAY, HEANEY, BRIGHT, ROSS and STEPHENSON, Circuit Judges, En Banc.*

PER CURIAM.

We are again asked to review a District Court decree purporting to establish a unitary school system in Little

* Judge Mehaffy took no part in the consideration or decision of these appeals.

Rock, Arkansas.[1] The court's proposed plan employs a variety of techniques, including pairing, clustering, and contiguous and noncontiguous zoning to achieve the stated objective. Under the plan, grades 6 through 12 would be integrated at the beginning of the 1971-72 school year. All students in grades 6 and 7 would be assigned to four middle school centers located in the generally white residential areas in the western section of the city; all students in grades 8 and 9 would be assigned to four junior high school centers, three of which are in the largely black residential areas in the eastern section of the city; and all students in grades 10 through 12 would be assigned to three high school centers, two in white residential areas and one—Central High School—in central Little Rock.[2] Substantial racial balance would be achieved in each school by assigning students to a particular school. Transportation would be provided for all students living more than two miles from their assigned school.

The disestablishment of a dual system at the elementary level would be delayed under the decree until the opening of the 1972-73 school year. By that date, however, the Board of Education would be required to "disestablish by means of pairing and grouping * * * the presently existing dual system of racially identifiable elementary schools and to replace it with a unitary system * * * and to assign elementary students to the schools in such a manner that

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[1] The decision of the District Court, *Delores Clark* v. *The Board of Education of the Little Rock School District, et al.*, is published at ... F.Supp. ... (E.D. Ark. July 16, 1971). For a history of the prior litigation involving this school district, see, *Clark* v. *Board of Education of Little Rock School District*, 426 F.2d 1035 (8th Cir. 1970).

[2] Western Little Rock is a rapidly growing area with ten elementary schools about ninety-six percent white. Central Little Rock is a transitional area with nine elementary schools about sixty-six per cent white. Eastern Little Rock is an area with a declining population about ninety-three percent black.

no elementary school can be identified as a school primarily intended or used for the education of students of any particular race [,and] to provide such transportation of students as may be necessary to implement its disestablishment plan for the elementary schools."

The plaintiffs, black residents of the school district, contend on appeal that the decree does not meet constitutional standards because (1) it needlessly delays integration at the elementary level; (2) it places an unequal share of the burden of integrating the secondary school level on black students for impermissible reasons; (3) it is not the plan best suited to achieve lasting integration; (4) it does not require assignment of faculty and staff in accordance with objective criteria; (5) it does not enjoin construction of an addition to a west end secondary school—Henderson—and thus encourages further segregation; and (6) it does not award plaintiffs attorneys' fees.

The defendants cross appeal. They argue (1) that the court abused its discretion in rejecting an alternative plan for the secondary schools, proposed by the Board of Education, which would have retained the Gibbs-Dunbar middle-grade school with a majority of black students and would have provided for the secondary grades to be organized on a somewhat different basis;[3] (2) that the board should not be required to integrate the elementary schools at the beginning of the 1972-73 school year; and (3) that the board should not be required to transport any of the students who live more than two miles from the school to which they have been assigned, particularly those who will be attending the secondary school closest to their home.

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[3] The Board of Education proposed what is referred to as a 5-3-2-2 plan. The trial court rejected this plan for a number of reasons set forth in its opinion, the most important ones being that under it, both graduating high schools would have been in western Little Rock, and that one middle school complex—Gibbs-Dunbar—would have had a black enrollment of ninety-five percent.

We accelerated the appeal and, shortly after oral argument, issued an order partially affirming the decision of the District Court insofar as it applies to the secondary schools. We did so because the District Court's plan in that respect is constitutionally permissible and well within the broad discretion of the District Court to impose. All of the alternatives proposed by the Board of Education involved a one-race junior high school and, under the circumstances of this case, would have been constitutionally deficient. While many secondary school students will have to be transported at the board's expense under the approved plan, no showing was made at the District Court level or here that this burden will be unreasonable or that the students will be transported unreasonable distances. Furthermore, it is conceded by both parties that if a nonracial school system is to be achieved, there is no reasonable alternative to transporting many students.

We note the plaintiffs' objection that the plan fails to designate Mann, the present black high school, as a graduating high school. While we agree that the burden of integration must be shared by blacks and whites, we do not agree that the sharing of the burden at the secondary level, when considered as a whole, is so unequal as to require upsetting the District Court's plan. Most 8th and 9th grade students will be required to attend school facilities which have heretofore been identifiably black, and all 6th and 7th grade students will be required to attend schools in facilities that have previously been identifiably white. Two of the three high schools will be in the western section of the city and are schools which have been identifiably white schools; but the third—Central—is clearly recognized as an integrated school and is centrally located to both blacks and whites. Moreover, we are reassured by the board's declaration that all secondary schools will be thoroughly integrated as to faculty, class composition and extracurricular activities, and that the school administra-

tion will be sensitive to the aspirations of black students. Finally, we note that, under this decision, transportation costs will be paid for all secondary students who live more than two miles from the school to which they are assigned, unless they attend the school closest to their home. This will help to alleviate the burden resulting from the fact that more black than white students will be required to attend schools out of their neighborhood.

THE SCHOOL CONSTRUCTION PROBLEM

We turn next to the issue raised by the proposed addition to the Henderson School. There are reasons why we should not permit this addition to be completed. The original facility was built in 1963, nine years after the Supreme Court decided *Brown I. Brown* v. *Board of Education of Topeka*, 347 U.S. 483 (1954). It was built in a white residential area far from the black neighborhoods, and was staffed with a largely white administration. The addition was started in 1970 when the board was acutely aware of its responsibilities to integrate its school system. Indeed, the District Court specifically cautioned against proceeding with the addition without its express permission. The addition could be considered an uneconomical one in that there is adequate space in other school buildings in the Little Rock school system to house the 6th and 7th grade students. On the other hand, the school district had spent nearly $100,000 on the project before construction was halted by injunction. The new classrooms will replace presently used portable classrooms, and the expenditure for foundations already incurred will be largely wasted unless the building is completed. Most importantly, the school will be completely integrated under the District Court plan. We thus permit the facility to be completed in accordance with the construction contract. We do, however, instruct the District Court that it is to revise its decree to provide that no additional school facilities are to

be constructed by the Little Rock School District without the express permission of the District Court. We further hold that the test to be used by that court in permitting additional construction is whether the proposed facilities will contribute to the establishment of a unitary school system. *Swann* v. *Charlotte-Mecklenburg Board of Education*, .:. U.S. ..., 28 L.Ed.2d 554, 569, 570 (April 20, 1971); *Kelley* v. *Altheimer, Arkansas Public School Dist. No. 22*, 378 F.2d 483, 496, 497 (8th Cir. 1967).

Swann teaches that many factors must be considered in determining school locations, but it would be constitutionally difficult to justify the construction of new facilities or additions to present facilities when sound existing facilities are already available which can be used without unreasonable burdens on the students and where the new facilities are being built to avoid integration. Public pressures to the contrary cannot be permitted to prevail,[4]

FACULTY AND STAFF ASSIGNMENT

It is clear that there will be a major faculty realignment as a result of the District Court's plan. The plaintiffs complain that the District Court's plan does not adequately protect black teachers because it does not require the board to establish objective nondiscriminatory criteria to be followed in reassigning teachers. The District Court stated that it would delay the establishment of such criteria until student assignment problems had been resolved. We find this delay to be impermissible.

We set forth the standards which a board of education must follow in reassigning teachers affected by the in-

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[4] See, *Clark* v. *Board of Education of Little Rock School District, supra* at 1044; *Bell* v. *West Point Municipal Separate School District* No. 30,175 (5th Cir. July 8, 1971); *Lee, et al.* v. *Macon County Board of Education, et al.*, No. 30,154 (5th Cir. June 29, 1971).

tegration of a school system in our opinion, *Addie Moore, et al.* v. *Board of Education of the Chidester School District No. 59, et al.*, No. 20,416 (8th Cir. September—1971):

> "[A] board of education is obligated to use objective nondiscriminatory standards in the employment, assignment and dismissal of teachers. A board may also consider established and previously announced nondiscriminatory subjective factors in making such decisions. We emphasize, however, that: '* * * race per se is an impermissible criterion for judging either an applicant's qualifications or the district's needs. And this applies equally to considerations described as environment or ability to communicate or speech patterns or capacity to establish rapport with pupils when these descriptions amount only to euphemistic references to actual or assumed racial distinctions. * * *' *Smith* v. *Board of Education of Morrilton Sch. Dist. No. 32* [365 F.2d 770 (8th Cir. 1966)] *supra* at 782. Furthermore, subjective standards carry little weight in meeting the board's burden to prove clearly and convincingly that it is not discriminating where there has been a history of racial segregation since Brown I. * * *"

Id. at .....

These standards must be followed here. The board should include in its plan to be submitted to the District Court the objective nondiscriminatory standards as well as the established and previously announced nondiscriminatory subjective factors which will be used by the board in assigning teachers. It is not sufficient to say that an aggrieved teacher may bring an action after the fact to protect his rights. Such actions are disruptive, expensive, time-consuming and burdensome. Furthermore, staff members who are discriminated against or retained in some capacity may be reluctant to bring suit lest they further

jeopardize their position. See, *Arkansas Education Association, et al.*, v. *Board of Education of the Portland, Ark., School District, et al.*, Nos. 20,412 and 20,413, slip opinion at p. 5 (8th Cir. July 26, 1971).

The necessity for establishing nondiscriminatory standards is supported by the statistic that in 1967, there were 134 black principals in Arkansas and that today, after substantial consolidation, there are only fifteen. The District Court must modify its decree to meet the above requirements.

THE ELEMENTARY SCHOOL PROBLEM

We feel it important at this point to restate certain facts with respect to the elementary schools:

(1) Little Rock has a long history of maintaining two sets of elementary schools in a single school system, deliberately operated to separate pupils in schools solely on the basis of race.

(2) Although the Board of Education has been requested to do so, it has never submitted an acceptable plan to integrate its elementary schools.

(3) In the 1970-71 school year, more than seventy-five percent of the black students attended twelve schools which were either totally black or more than ninety percent black, and more than seventy-five percent of the white students attended eleven elementary schools which were either all-white or more than ninety percent white.

(4) Since *Brown I*, two new elementary schools have been constructed in the heavily black sections of Little Rock. Both were staffed with blacks, and both were named after prominent blacks. During the same period of time, a number of new elementary schools were constructed in areas of white suburban expansion far from black population centers.

(5) Three elementary schools—Rightsell, Mitchell and Centennial—were white schools when *Brown I* was decided. All are now racially identifiable as black schools—Rightsell because it was converted to a black school by the Board of Education, and Mitchell and Centennial because white residents moved from eastern to western Little Rock.

(6) The Board of Education does not now provide transportation for its elementary students.

All of the above facts were known to this Court when it decided *Clark II*. *Clark v. Board of Education of Little Rock School District*, 426 F.2d 1035 (8th Cir. 1970). The circumstances closely parallel those in *Swann; Davis* v. *Board of School Commrs.*, ... U.S. ..., 28 L.Ed.2d 577 (April 20, 1971); and, *McDaniel* v. *Barresi*, ... U.S. ..., 28 L.Ed.2d 582 (April 20, 1971).

For the reasons set forth in those decisions and in *Clark II*, we hold that the District Court correctly decided that the school district was obligated to develop a unitary school system at the elementary level and to provide the transportation necessary to achieve that goal. In view of the serious delays which have already occurred in this matter, however, we do not believe that integration at the elementary level can be totally delayed until the beginning of the 1972-73 school year. A definite time schedule must be adopted and some progress must be made during the current school year.

We recognize the practical problems involved in making the transition. First, we doubt that the Board of Education has ever squarely faced the fact that it must make the decreed change. Thus, it must be given some time to come up with a plan that will work. Second, the District Court found that the required transportation facilities could not be arranged by the opening of the 1971-72 school year for both the secondary and the elementary schools,

and there is adequate evidence to support this finding. Third, many budget changes will have to be made and state funds applied for if the plan is to work. We require that everyone give his or her best effort to make the necessary adjustments at the earliest possible time.

With respect to the requirements of a plan for the elementary grades, we can only reiterate what has already been said: that pairing, clustering, the use of contiguous and noncontiguous zones, and the transportation of students are legitimate techniques to achieve the constitutional objective of a unitary school system, and that these and other techniques must be used here; that the burden on all students, black and white, should be as equitable as possible; that every school need not reflect the same racial composition as the district as a whole; that elementary students who already attend integrated schools in their own neighborhoods should not be disturbed for other than compelling circumstances; that the use of complexes, such as the Beta Complex, is permissible; that what we have said elsewhere in this opinion with respect to faculty, staff and the use of existing facilities at the secondary level is equally applicable to the elementary schools; and finally, that the plan should be one which gives promise of working now and in the future. See, May, *Busing; Swann v. Charlotte-Mecklenburg, and the Future Desegregation in the Fifth Circuit*, 49 TEXAS L. REV. 884 (1971).

We remand this matter to the District Court with instructions: (1) to require the Board of Education to submit a plan for the establishment of a unitary system of elementary schools to the District Court no later than November 1, 1971; (2) to require the Board of Education to implement the plan to the extent possible during the current school year and to fully implement the plan no later than the beginning of the 1972-73 school year; (3) in the event the Board of Education's plan does not maxi-

mize the unitization of the elementary schools for the current term within fiscal and physical possibility, and the plan does not fully establish a unitary school system no later than the beginning of the 1972-73 school term, the court shall take such action as is necessary to achieve those objectives, including modifying the plan or devising alternatives thereto; (4) to require the Board of Education to make the necessary provisions in the budget now being prepared for the 1972-73 school year for all costs incidental to the integration of the school system; (5) to require the Board of Education to take immediate steps to arrange for the transportation necessary under the plan, and to make application for such state or federal funds as may be available for such purposes; and (6) to require that in the interim between the District Court's approval of a plan for the operation of the schools for the 1972-73 school term and the beginning of that term, the Board of Education submit to the District Court every sixty days a report of its progress toward the implementation of the approved plan.

The District Court shall promptly consider the plan submitted by the Board of Education and shall take every necessary action in regard thereto, in order that the Little Rock schools fulfill the objective of the unitary school system no later than the beginning of the 1972-73 school year.

THE COST OF TRANSPORTING SECONDARY STUDENTS

With one exception, we affirm the decision of the District Court insofar as it requires the district to furnish transportation to secondary students assigned to a school more than two miles from their homes, the exception being that the board is not required to provide transportation to those students who continue to attend the secondary school

closest to their home. We feel that the constitutional rights of the latter students have not been or will not be affected.

ATTORNEYS' FEES

The plaintiffs should no longer be required to bear the continuing expense of attorneys' fees to vindicate their constitutional rights. They are entitled to attorneys' fees for services performed by them in processing this appeal and cross-appeal. Accordingly, the plaintiffs will be awarded $2,500 attorneys' fees in this Court.

The decision of the District Court is affirmed in part and reversed in part. The matter is remanded to the District Court with the directions heretofore set forth, and with instruction to the District Court that it is to retain jurisdiction of the matter.[5] Mandate of this Court to issue forthwith.

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit.

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[5] Subsequent to oral argument, the Board of Education submitted reports to this Court with respect to its interpretation of the Court's preliminary order. Insofar as these questions have not been answered by this opinion, they are to be determined by the District Court.

APPENDIX III

In the United States District Court
Eastern District of Arkansas
Western Division

Delores Clark, et al., Plaintiffs, v. The Board of Directors of the Little Rock School District, et al., Defendants.	LR-64-C-155

MEMORANDUM OPINION

(Filed July 10, 1971)

This litigation which involves the racial integration of the public schools of the City of Little Rock, Arkansas, and which has been in the courts for some sixteen years is again before the Court pursuant to an order of the Court of Appeals entered on May 4, 1971, remanding the case for further consideration.[1] The Court was directed to call upon the defendants to submit a new integration plan conforming to the requirements of the four decisions

[1] On the same day the Court of Appeals entered a similar order remanding the case involving the public schools of North Little Rock. Both cases had been pending in the Court of Appeals in connection with appeals taken from decrees entered by this Court in the late summer of 1970 which permitted the schools to operate under certain conditions during the 1970-71 school year.

of the Supreme Court handed down on April 20,[2] to conduct appropriate hearings, and to rule on the new plan not later than August 1.

The Court promptly entered an order calling on the School District to submit a new plan which was done on June 8. An extensive hearing which consumed three days was commenced on June 16. On June 21 the Court conducted a hearing in connection with a plan submitted by the North Little Rock School District which has integration problems quite similar to those of Little Rock. At the conclusion of that hearing the Court directed the defendants in this case to submit an alternative plan designed to eliminate what the Court considered to be a patently discriminatory situation that would have been created under the June 8 plan. The alternative plan was submitted on June 28, and a hearing on it was held on July 12. The Court will call the June 8 plan "Plan I" and the June 28 plan "Plan II." Both plans have been given careful consideration along with other questions included in the remand of the case. This memorandum opinion incorporates the Court's findings of fact and conclusions of law with respect to the issues before it.

Historically, the Little Rock public schools have been operated on what is known as the 6-3-3 basis; that is to say, the system had six elementary grades, three junior high grades, and three senior high grades. Up until the comparatively recent construction of the Parkview High School in the western part of the City, the District operated four senior high schools. The oldest of those schools

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[2] Swann v. Charlotte-Mecklenburg Board of Education, ... U.S. ...; Davis v. Board of School Commissioners of Mobile County, ... U.S. ...; North Carolina State Board of Education v. Swann, ... U.S. ...; and McDaniel, Superintendent of Schools v. Barresi, ... U.S. .... Of those decisions the Charlotte-Mecklenburg case is the most important; its companion case, North Carolina State Board of Education v. Swann is also of substantial significance.

was Central High School which is located in what was the central part of Little Rock when the school was built; it was constructed as a "pre-Brown" school for the education of white students only. Horace Mann High School, a facility of more recent construction, was built in a predominantly Negro section in the eastern part of the City and has always been identifiable as a Negro school. Hall High School was built after the Brown decisions were rendered; it is located in the western part of the City in an essentially all white neighborhood and until a very short time ago was an all white school. The fourth school was Metropolitan High School, a fully integrated vocational-technological institution which has never really been in controversy in this litigation.

Last year the District operated five high schools, Central, Mann, Hall, Metropolitan, and Parkview. Parkview, like Hall, is located in a nearly all white affluent neighborhood, and is substantially to the south and west of Hall.

The junior high school system consisted of seven schools located in various parts of the City and prior to the 1970-71 school year just about all of them were racially identifiable, some of them notably so.

There were some 31 elementary schools located throughout the City and in accordance with the neighborhood school concept. Since housing in Little Rock is de facto segregated, the elementary schools were naturally racially identifiable. They still are.

In 1969 the late Judge Gordon E. Young approved a desegregation plan for Little Rock which the Court of Appeals found insufficient as far as student body desegregation was concerned, although the appellate court noted that substantial progress in that area had been made. Clark v. Board of Education, 8 Cir., 426 F. 2d 1035 (1970). The holding of the District Court was reversed, and the cause was remanded for further proceedings.

A new plan was filed which this Court considered in August 1970. In a decree entered on August 17, 1970, the Court approved the plan in part and disapproved it in part as an operating plan for the 1970-71 school year. As far as the high schools were concerned, the Court approved the plan, including the aspect which involved the phasing out of Mann as a senior high school, provided that the Board made certain commitments mentioned in the decree and in the accompanying memorandum opinion. As far as elementary students were concerned, the plan contemplated their continued assignments to neighborhood schools, and that aspect of the plan was approved for 1970-71. The plan for the junior high schools was disapproved. As to them; the decree provided:

> ". . . The District is now mandatorily enjoined to proceed forthwith to commence the disestablishment of the dual junior high school system that it is now operating; the disestablishment of that system must be effectively commenced as of the beginning of the 1970-71 school year and must be completed as of the beginning of the 1971-72 school year. By September 1, 1970, the District will file a statement with the Court setting forth what it proposes to do with respect to 1970-71 and what it expects to do with respect to 1971-72 . . ."

The statement called for by the decree was filed; and this Court considered the junior high school situation again in late September 1970. The junior high school plan was finally approved for 1970-71 only. Clark v. Board of Education, E.D. Ark., 316 F. Supp. 1209 (1970).

Appeals were taken from the Court's orders of August and September, 1970 and were still pending when the Supreme Court handed down its most recent school decisions heretofore mentioned.

One of the matters that the Court considered in August 1970 was certain proposed construction at the Henderson Junior High School located in the western part of the City. However, the record made up on that issue was scanty, not much emphasis was laid on it, and the Court passed it over lightly. During the pendency of the appeals the Court of Appeals entered a limited order of remand directing the Court to consider the matter of the Henderson construction more fully. The Court did so and found that the construction was proper and would neither help nor hinder integration, and the Court refused to enjoin the prosecution of the work. However, the Court of Appeals entered an order last December restraining the construction until the basic controversies before it should be decided.[3] The current order of remand vacates the injunction issued by the Court of Appeals and directs this Court to consider the Henderson construction again, which has been done. The matter will be dealt with in this opinion along with other issues.

In formulating Plan I now before the Court the School Board decided on a drastic restructuring of the overall school system. That involved the abandonment of the old 6-3-3 system and the substitution therefor of a 5-3-2-2 system. Under Plan I Grades 1-5 may be considered elementary grades; Grades 6-8 may be considered "middle grades"; Grades 9-10 may be considered junior high school grades; and Grades 11-12 may be considered senior high school grades.

Plan I makes no change in the existing method of assigning elementary students to their schools. They will still attend schools located in accordance with the neighborhood school concept. There would be a closing of some elementary schools which would increase to some extent

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[3] Similar work on an elementary school in the North Little Rock District was also enjoined pendente lite by the Court of Appeals.

the degree of integration in other elementary schools. It is clear, however, that racially identifiable schools would continue to exist.[4]

Children in Grades 6-8 would be educated in four "middle schools" or middle school complexes and would be assigned to schools on the basis of geographical attendance zones. Under Plan I almost 49 percent of the District's total middle school Negro enrollment would attend the Gibbs-Dunbar complex located in a predominantly Negro section of the City, and nearly 95 percent of the enrollment in that complex under Plan I would be black.

Plan I makes use of Horace Mann High School and Central High School for the education of students in the 9th and 10th grades and of Hall and Parkview High Schools for the education of 11th and 12th grade students. Students in those four grades would be assigned to schools on the basis of geographical zones, and it appears to the Court that Plan I would achieve essential racial balance at those four grade levels.

Another facet of Plan I which should be mentioned is that it would pair the formerly predominantly Negro Booker Junior High School with Metropolitan High School so as to create an advanced vocational-technical education complex, attendance at which would be entirely voluntary and completely unrelated to the race of students desiring an education of that type. Students completing their course of vocational training would be ceremonially graduated from either Hall or Parkview both of which are schools fully accredited by the North Central Association of Secondary Schools and Colleges.

The striking racial imbalance that would exist at the Dunbar-Gibbs complex (hereinafter called simply Dun-

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[4] The same situation obtains in North Little Rock where, as in Little Rock, housing is de facto segregated.

bar), is what caused the Court to call upon the Board to produce what has become Plan II. Plan II, which the Board does not actively advocate, contains a suggestion for the elimination of Plan I's racial imbalance at Dunbar and for balancing racially all of the middle schools in the District. That would be done by dispersing large numbers of Negro students who normally would go to Dunbar among the other middle schools and replacing them with white students transferred from other sections of the City. While racial balance could thus be achieved in all of the District's middle schools, given financial and logistical means, it is clear that the suggested revision of Plan I would involve the daily transportation of large numbers of students of both races to and from school each day. The Board objects to providing that transportation pointing to its high cost and the difficulty in obtaining buses on short notice.

As an alternative the Board suggests, but again does not advocate, a restructuring of the secondary grades so that the overall system would be a 5-2-2-3 system. Under that system, which would not substantially affect elementary students, students in Grades 6 and 7 would go to one group of schools; students in Grades 8 and 9 would go to another group of schools; and students in Grades 10-12 would attend Central, Hall, and Parkview High Schools.

Under that arrangement the schools for eighth and ninth graders would be Booker, Dunbar, Mann, and Pulaski Heights.[5] Negroes make up 39.2 percent of the District's enrollment in the eighth and ninth grades; the use of the arrangement now under discussion would create Negro minorities in all of the eighth and ninth grade schools and would achieve good racial balance in all of those schools. The percentages would vary from 36.7

[5] Plan II seems not to envision the Booker-Metropolitan complex contemplated by Plan I.

at Booker to 41 percent at Mann; and the black majority that would exist at Dunbar under Plan I would be converted into a minority of 38.4 percent under Plan II. The arrangement would also come very close to achieving exact racial balance in the sixth and seventh grade schools which would be three in number.

But, the Board has no more relish for eliminating the racial imbalance at Dunbar under the 5-2-2-3 structure than it has for eliminating it under the 5-3-2-2 structure. As stated, the Board prefers the latter structure, and it states in Plan II that a predominantly black Dunbar is an integral part of that structure. As another alternative, Plan II suggests that the Board be permitted to retain Dunbar as a predominantly black school but with a substantially reduced enrollment at least during the 1971-72 school year.

Before passing on the questions presented in connection with the assignments of students to schools, the Court desires to dispose of what it considers to be subsidiary issues in the case.

I

The plan submitted by counsel for plaintiffs and intervenors calls for staff and faculty assignments on the basis of objective criteria, principally seniority. Specifically, this plan calls for Central and Hall High Schools to be the graduating high schools, and counsel suggests that Mr. Harry Carter, the present principal at Central, be retained in his post, and that the other principalship be given to Mr. Edwin Harkins who has been the principal at Mann.

The Court is convinced that the District's staff and faculty have been essentially desegregated although the Court is aware that some black employees of the District may be dissatisfied with their individual assignments

or may be concerned about their status or job security as integration proceeds.

While the Court is not inclined to minimize that dissatisfaction and concern, the Court thinks that today, as in years past, the Little Rock District's principal integration problem relates to student assignments, and until that problem is solved satisfactorily the Court is not inclined at this stage to interfere with individual assignments of staff members and teachers or to impose on the Board objective criteria in such assignments to the exclusion of everything else.

The Board, the Superintendent of Schools, and the Principals know, of course, that they may not lawfully discriminate against any employee of the District on the basis of race, and they know that Negro administrators and teachers may not constitutionally be required to bear the full or a disproportionately heavy part of the burden of desegregation.

In the circumstances the Court will decline to make any further positive requirements of the District in the area of staff and faculty desegregation at this time. There are, however, some comments that the Court wishes to make.

As far as staff and faculty desegregation is concerned, the Court thinks it fair to say that the Negroes who are most immediately and urgently affected by the conversion of the Little Rock school from a dual to a unitary system are those who have been employed at the senior high school level at Mann which under either Plan I or Plan II will no longer exist as a senior high school.

Principal Hawkins who has been mentioned has been a successful principal at Mann for a number of years. He has applied for employment as a principal at one of the other high schools. Superintendent Parsons testified on July 12 that as far as he knows Mr. Hawkins is quali-

fied to serve as a principal at one of the other high schools. The Court thinks that the Board would do well to give serious consideration to hiring him in that position or in some other significant administrative position consistent with his training and experience.

The Court thinks too that the Board should make every effort to incorporate into the unitary system specialized Negro personnel such as athletic coaches, band directors, and similar categories of employees.

Finally, the Court thinks that in assigning Negro teachers heretofore employed at Mann to other schools in the District the Board should not only put them in classrooms and give them pupils to teach but should also take into account certain paraeducational interests held by some individual black teachers.

II

The question of the construction at Henderson need not delay us long. The Court dealt exhaustively with that construction in a memorandum opinion filed on December 8, 1970, and will not stop to repeat or paraphrase what it had to say in that opinion. There are some 26,000 people who reside in the general area served by Henderson; the school is needed, and the construction is needed; substantial sums amounting to above $100,000 have been spent already that will be lost if the construction cannot proceed. The Court is convinced as it was last December that the work that has been contracted will not adversely affect integration.

No further immediate construction of any significance is contemplated by the District at this time. When some construction that the Board does have in mind for the future becomes imminent, it will be time enough to consider its constitutional propriety.

Before leaving this subject the Court desires to emphasize that the concern of a federal court with local school construction is a strictly limited one. Whether, and where and to what extent public schools should be built or improved are questions that address themselves primarily to the judgment and discretion of local school officials; and federal courts should not interfere with their decisions unless it is clear that a particular project, or contemplated project will militate against the school board's achievement of its constitutionally required objective to establish and operate a racially non-discriminatory school system.

Since the Court is convinced that the Henderson construction will have no impact on integration, the Court does not consider that the question of whether that construction should proceed is a constitutional one, and as far as the Court is concerned, the construction may proceed.

III

The most recent decisions of the Supreme Court, heretofore cited in the margin, really express very little that is new. Considered collectively, they sum up, restate, and to some extent clarify principles already established by its own earlier decisions and by numerous decisions of the Courts of Appeals which have dealt extensively with school desegregation. It seems to the Court that the April holdings may be summarized substantially as follows:

1. "State imposed segregation" of the races in the public schools is unconstitutional. Perhaps unfortunately, the term "State imposed segregation" is not defined with precision. No clear answer is given to the question of where State action stops and purely private action begins.

2. In school districts like Little Rock and North Little Rock where dual school systems of racially identifiable schools were originally established by law, those dual systems must be abolished and must be replaced by unitary systems in which no schools can be identified as "black schools" or "white schools."

3. A school is racially identifiable if it is obviously designed or intentionally used primarily for the education of students of a particular race. A school may be idenfified racially by reference to faculty, facilities, or student body.

4. The Constitution does not require precise or exact racial balance of faculties or student bodies in every one of the schools of a district or at all times. However, the achieving of substantial racial balance is an effective and permissible means of disestablishing a dual school system.

5. A state may not use its legislative or other powers to thwart a school district in carrying out its constitutional duty to integrate its schools, and local school authorities have a broad discretion in determining the means to be employed in arriving at the required goal of a unitary system.

6. The means available to a school district faced with the task of integration include the assignment of students to schools on the basis of race and the closing, grouping, and pairing of schools, where necessary to replace an unconstitutional dual system with a unitary one.

7. With specific regard to "busing," the practice is not prohibited by the Civil Rights Act of 1964 or otherwise, and is a permissible tool to achieve integration. The Court did not say in express terms that busing is constitutionally required if necessary to achieve integration. However, in its most recent opinion dealing with the

North Little Rock schools, Davis (formerly Graves) v. Board of Education, E.D. Ark., ... F.Supp ..., (1971), this Court felt impelled to predict reluctantly that sooner or later the federal appellate courts will require busing if that is the only means whereby a school district can be integrated.

8. In the last analysis a federal district court sitting in a school integration case exercises the traditional function of a court of equity in any case involving the fashioning of equitable remedies. That is to say, it exercises its judicial discretion with due regard to practical considerations. Such a court in such a case is concerned with remedying a constitutional wrong if it exists; it is not concerned with non-constitutional questions or with matters lying properly within the administrative judgment and discretion of local school authorities.

With that summary in mind, the Court now turns to a consideration of the basic issue in the case, the constitutional sufficiency of the plans. Other things being equal, an integration plan which commends itself to popular approval and support is to be preferred to one that does not; and similarly an integration plan that is educationally sound is to be preferred over one that is educationally unsound or less sound. But, while the Judge of the Court as a citizen is interested in those considerations, the Court is not ultimately concerned with them. In the last analysis what the Court is concerned with here is whether the plans before it are sufficient to disestablish the dual school system which has prevailed heretofore in Little Rock and to replace it with a unitary system as is now constitutionally required.

IV

Neither the Court nor the Board is writing on a clean slate. The plans now before the Court must be considered and evaluated not only by reference to their contents

but also against the backdrop of the long history of this case and the general trend of judicial decisions in the field of school desegregation which was mentioned in Davis, supra, ... F.Supp. ....

Taking up first the secondary schools which are Grades 6-12 under either Plan I or Plan II, the District was mandatorily enjoined by this Court in 1970 to integrate its secondary grades completely by the beginning of the 1971-72 school year and to keep them integrated. The Court's decree was not stayed, and in the Court's opinion the Board never had any real reason to expect that either the Court of Appeals or the Supreme Court would permit it to open school this fall with a dual secondary school system although it might reasonably have entertained some hope that it would be permitted to continue to operate its elementary schools on the basis of the neighborhood school concept. In any event, that portion of the decree is still in force, and that is the starting point of evaluation of the plans now under consideration.

From a constitutional standpoint it makes no difference whether the Little Rock schools have a 5-3-2-2 structure, or a 5-2-2-3 structure, or some other structure as long as the system is a unitary rather than a dual one. Therefore, as far as structure is concerned both Plan I and Plan II are satisfactory from a constitutional standpoint. From an educational standpoint Plan I has some advantages over Plan II, but Plan II has its own advantages over Plan I.

Plan I, as now drawn, does not comply with the Court's 1970 decree relating to the secondary schools because it leaves Dunbar with a black enrollment of more than 90 percent which would quickly become 100 percent. That will not do.

While the Supreme Court in the Charlotte-Mecklenburg case suggests that an all black school might in certain

circumstances bear constitutional scrutiny, the Court does not think that that suggestion is applicable to Dunbar. Dunbar did not become an all black school fortuitously or on account of shifts in population unrelated to racial segregation imposed by law. It was built as a black school in the days of de jure segregation in Arkansas. It was located purposely in a black neighborhood and under Plan I it would offer instruction to almost half of the District's black students at the middle school level. It would be automatically identified as an educational facility designed primarily for Negro students. Also, leaving Dunbar black will leave the other middle schools racially imbalanced whereas if the black majority at Dunbar is eliminated and the students dispersed among the other middle schools, as the Board concedes can be done at least on paper, almost exact racial balance will be achieved in all of the District's middle schools, including Dunbar.

As a plan for the secondary schools, Plan I as now written will be disapproved.

If the Dunbar problem can be solved, the Court would have no trouble with student assignments in Grades 9-12 because under either Plan I or Plan II the racial identifiability of schools offering instruction at those grade levels would be destroyed.

Plaintiffs argue that both Plan I and Plan II unfairly and unconstitutionally place an undue burden on black students residing in the eastern and central parts of the City. That school integration that requires for its implementation the movement of students for substantial distances in order to attend the schools to which they are assigned imposes burdens on students of both races cannot be denied. And it appears to the Court that where in a bi-racial district like Little Rock where housing patterns are segregated and where one race is in a distinct

minority, the "burden of integration" is necessarily going to bear more heavily on students of the minority race, whether the minority be black or white. That is true because in order to make the racial consists of all of the schools reflect in general the racial ratios of the overall population of the district, it is necessary to move a higher percentage of the members of the minority race than of the members of the racial majority. And that fact exists irrespective of any difference in the relative affluence of members of the two races.

The fact that residential housing in Little Rock is segregated is not the fault of the School Board and is a matter that is not within the control of either the Board or the Court. The schools have been built where they are, and it is too late in the day to scrap them and replace them with schools located more centrally or more conveniently to the bulk of the Negro population.

It is probably fair to say that to use Central as a graduating high school would substantially lessen the burden of integration on black high school students as a class since many of them would be assigned to that school which is closer to their homes than are Hall and Parkview to which they would be assigned under Plan I.[6] On the other hand, Plan I's burden on blacks at grade levels 11 and 12 would be to some extent offset by the corresponding burden placed on white students at grade levels 9 and 10.

As far as the elementary schools are concerned, the Court thinks it unrealistic to hope today, as the Court hoped in 1970, that if a school district fully integrates its secondary school system, it can assign elementary stu-

[6] Entirely apart from any question of integration, there are strong arguments, educational and other, that can be made for retaining Central as a high school. And the Board's plan to relegate it to the status of a junior high school is a highly controversial one in Little Rock.

dents to schools near their homes even though that method of assignment leaves the elementary schools racially identifiable.

In Davis v. Board of Education, supra, the Court held that the elementary school system of North Little Rock must be integrated as well as the secondary school system, and the Court can do no less in this case. Defendants concede that the elementary schools can be integrated by grouping and pairing of schools, and the defendants are going to have to do so.

V

The discussion in the preceding section of this opinion tacitly assumed that the Board would be able to implement any constitutionally acceptable plan that might be devised and discussion was limited to the sufficiency of the plans as plans. It must be realized, however, that the problem of student assignments in the Little Rock District, and in other districts similarly situated, has two aspects. The sufficiency of an integration plan is one thing; the implementation of a sufficient plan is another thing. However, the two aspects of the problem blend into each other because the choice of a plan may well depend on whether and when it can be implemented. It is now necessary to talk about implementation. To put it bluntly, it is now necessary to consider the question of busing.

In Little Rock the real difficulty with school integration is not in formulating a plan that will serve the purpose; the problem lies in the implementation of an acceptable plan. That is true because in Little Rock, as in North Little Rock, the schools simply cannot be integrated without a massive transportation of students of all grade levels. The Little Rock School District today is in poor condition at best to provide transportation for large numbers of students and without such transportation hundreds

of students will not be able to go to school if assigned to facilities located far from their homes. The problem is most acute at the elementary grade levels, but it also exists at the secondary grade levels.

The Court recognizes at the start that the whole idea of busing, particularly at the elementary grade levels and involving young children, is repugnant to the white patrons of the District as a class, and that their repugnance is shared by many if not most of the black patrons of the District. Parents of young children, whether black or white, simply do not like to have the children hauled long distances day after day merely to achieve racial balance in the schools.

This Court has never hesitated to express its opposition to busing for that purpose. Davis v. Board of Education, supra, ... F.Supp. ...; Clark v. Board of Education, supra, 316 F.Supp. at 1214; Graves v. Board of Education, E.D. Ark., 302 F.Supp. 136, 141-142 (1969); Graves v. Board of Education, E.D. Ark., 299 F.Supp. 843, 851 (1969). While the Court adheres to the views expressed in those opinions, it also adheres to its reluctant prediction made in Davis, supra, that the federal appellate courts will sooner or later require busing in districts like Little Rock and North Little Rock where full integration cannot be achieved by any other method. The real question on this phase of the case is not "whether" but "when." Two factors must be considered: cost and the availability of buses.

From its consideration of the evidence the Court finds that it would be financially and logistically impossible for the District to provide transportation during the 1971-72 school year for all of its students at all grade levels. The District lacks the money and could not acquire by purchase, lease, contract, or otherwise enough vehicles to do the job.

The Court further finds, however, that the District can with difficulty and at a substantial expense to its overall educational program provide necessary transportation this year for its students at Grade levels 6-12. It will be required to do so, and it will also be required to achieve reasonable racial balance at Dunbar. The Court is not willing to accept the Board's alternative proposals set out in Plan II that it be permitted to retain Dunbar as a black school but with a reduced enrollment during the 1971-72 session.

As far as students in Grades 1-5 are concerned, the Board will be permitted to assign them for this year only on the basis of geographical attendance zones as has been done in the past. As of the opening of school for the 1972-73 session, the elementary grades must be integrated satisfactorily, and well in advance of the commencement of that session the Board will be required to present a concrete plan for disestablishing the dual elementary school system.

The Court deems it well to comment further about transportation within the District at the secondary school level.

The estimated revenues of the District for the current fiscal year which will end on June 30, 1972, will exceed last year's revenues by about $1,000,000. Although, as stated, the District was ordered in 1970 to integrate its secondary grades completely by the opening of school this year, and although the District knew that in order to do that it would probably have to transport large numbers of students, it made no allocation whatever for such in the field of transportation costs. For one thing, transportation of students in a large city involves many more starts, stops, and sharp turns than does transportation in a rural district, and for that reason is naturally more expensive. Further, rural districts frequently make use of coaches, janitors, teachers, parents, and older students as

bus drivers, and the compensation paid to those drivers is frequently quite low—much lower than the Little Rock District may be expected to have to pay.

Nor does the Court think that Little Rock's transportation expenses for its first year in the venture will be as low as the State average if for no other reason than that the District will face some initial expenses which other districts which have engaged in transportation longer will not have to bear.

The Court recalls from the testimony in the North Little Rock case that that District engaged in some limited transportation of poor students last year using federal funds and that the per pupil cost was about $55 per year.

All in all, the Court thinks that it will probably cost the District about $60 per child this year to provide the necessary transportation. That, of course, would amount to $270,000 gross, but since the District will be eligible to receive $90,000 as reimbursement from the State, the net cost should not exceed $180,000. Per pupil cost in later years should be less.

The Court does not think that the District would be able to buy enough new buses between now and September to transport all of the affected secondary grade students even if the Board desired to do so. Buying a school bus is a two step process. The school district first buys a chassis and then turns it over to a manufacturer of bus bodies who builds the body and installs it on the chassis. The body manufacturer ordinarily does not build the body until he has the chassis. It takes about thirty days at best for a district to acquire a chassis; chassis supply varies seasonally, and the supply is short this time of year.

However, it appears to the Court that the Board, if it uses diligence, ought to be able to acquire some buses from some sources, and that it can make arrangements for

others with private transportation when it prepared its operating budget for fiscal '72; nor did it take any steps to acquire any buses; nor did it apply to the State Department of Education for State aid for transportation purposes until after the hearing that the Court conducted in June of this year. An application for such aid has now been filed, and the District will be eligible to receive from the State $20 per year per transported child. If the District buys any buses, it will also be entitled to receive from the State an annual grant of $1,085 per bus.

While the Board does not desire to engage in any large scale transportation this year, it has stated that it will provide or undertake to provide such transportation as the Court may order regardless of the extent to which its educational program may be impoverished.

Satisfactory integration of the secondary grades this year will or may require the transportation of between 4 and 5 thousand students at grade levels 6-12. For purposes of discussion let it be assumed that transportation for 4,500 students may be required. The Board estimates that it will cost $90 per school year per child to provide the necessary transportation; on that basis the total cost would be $405,000.

The Court thinks that the Board's $90 per child estimate is considerably too high. In the course of the June hearing Mr. J. L. Eidson, Supervisor of School Transportation in the State Department of Education, testified that transportation costs vary inversely to population density, and that the average transportation cost in the State last year was $47.27 per transported child per school year. He also pointed out that during the 1968-69 school year the transportation cost in the Pulaski County Special School District which engages in extensive busing of students was only $27.15. However, that low figure loses a great deal

of significance when it is realized that the Special District has not bought any new buses for several years.

While the Court thinks that the Board's estimate of $90 per child is too high, the Court does not think it realistic to compare the Little Rock District with the predominantly rural Special District bus operators in this area, and that it can make arrangements with the Twin City Transit Co., which holds the franchise for general public transportation in Little Rock and North Little Rock, for the transportation of many students. Certainly, the transit company needs the business and would like to have it if it can be protected adequately from student vandalism, which is no small problem.

The Court realizes that the transportation facilities that the District will be able to furnish this year will probably not be luxurious or even particularly comfortable, but the Court thinks that they will do to get the students to and from school; and they will have to do.

The Court also realizes that the money that the District is going to have to spend for transportation will have to come out of funds that otherwise would be spent for increased salaries, educational supplies and materials, and for other conventional and desirable educational purposes. There is nothing that the Court can do about that. At this time at least the duty of the District to comply with the requirements of the Supreme Court, the Court of Appeals, and this Court in the matter of integration must take priority over ordinary educational considerations. There is legislation pending in Congress which, if enacted, may be of substantial help to the District financially; and there is always the possibility that the voters of the District will approve an increased millage for school purposes, although they are likely to prove most reluctant to do so.

The question arises as to whom the Board must offer transportation. At the three upper grade levels the Board would like to limit transportation to students who without it would be unable to attend school, and in any event would like to give preference to students residing long distances from their schools over students residing comparatively close to the schools to which they are assigned.

The Court thinks that initially the Board should be required to provide transportation to all secondary grade students who desire to be transported and who live more than two miles from their assigned schools, and the Board will be so required initially. If by mid-term it turns out that this puts an impossible burden upon the Board, it may apply to the Court for leave to provide transportation on a more limited basis taking into consideration such factors as financial need, distance from school, and age.

Some concern has been expressed that black students who attended Horace Mann High School last year will not be able or will find it difficult to participate during their senior year in student activities, such as athletics, at the schools to which they will be assigned. It is the Court's understanding that the school administration is working on that problem. It goes without saying that the students in question are entitled to participate fully in all phases of student life, and they should be encouraged to do so.

The "The Three Year High School" aspect of Plan II contemplates that students who attended Central, Hall, and Parkview High Schools last year as eleventh graders may, if they wish, remain in attendance at and graduate from their old schools. The evidence is to the effect that this will not substantially affect racial balance in any of the three schools; it is a reasonable provision and will be allowed.

VI

It is necessary for the Court to consider briefly an intervention filed on behalf of a number of Negro school patrons anxious to preserve Mann as a high school facility, and another intervention filed on behalf of some white patrons who apparently feel that the requirements of the Supreme Court can be met by assignments based on geographical attendance zones but with a full and complete right of a student to transfer from a school in which his race is in a majority to a school in which his race is in a minority.

The Court does not think that the proposal of the white intervenors would disestablish the existing dual school system or that it meets constitutional requirements. Their intervention will be dismissed.

As to the intervention of the black patrons, the Court understands and sympathizes with their failure to keep Mann open as a high school. The Court considered that problem in 1970 when it approved the phase-out of Mann originally. The Court thought then and thinks now that the question of whether to keep Mann open as a high school or whether to make other use of it was one that addressed itself to the administrative judgment of the Board and that it was not of constitutional magnitude. So, the intervention filed by the black patrons will be dismissed along with that filed by the white patrons.

VII

The Court has considered the alternative plan submitted by plaintiffs and the original intervenors. Assuming that their plan would effectively integrate the schools, the Court is not going to impose it on the District.

Normally, the Court would leave it up to the Board to decide whether it wants a 5-2-2-3 structure or a 5-3-2-2

structure. However, to take that course would entail at least some more delay, and the Board might make some variations that would call for another hearing which would entail still more delay. As stated, the Court is mandated to decide this case and send it on its way not later than August 1 which is not far off. Further, the Court suspects that the Board actually wants the Court to make its choice for them.

The Court will do so initially and will opt for the 5-2-2-3 structure, with Central being retained as a graduating high school. As noted, there are good reasons, aside from integration, for continuing to use Central as a high school, its use as a high school will make integration somewhat less burdensome on the Negroes and should tend to decrease the drop-out rate of Negroes at the high school level; and the Superintendent of Schools who is responsible for the day to day operation of the schools seems to prefer three year high schools.

This, of course, does not mean that the Board will be committed permanently to a 5-2-2-3 structure. If with respect to 1972-73 or any later year or years it desires to have 5-3-2-2 structure or any other structure not characterized by racial discrimination, it will be free to make a change.

A decree in accordance with the Court's determinations will be entered. That decree will approve Plan I as it applies to the assignment of elementary school students for this year only with the stipulation, spelled out in the plan, that elementary students desiring to transfer from majority to minority situations may do so as a matter of right and that the District will provide transportation to the transferee schools; otherwise, Plan I will be disapproved.

The "Three Year High School Plan" set out in Paragraph 5 of the Supplementary Report of Defendants filed

herein on June 28, 1971, will be approved, and the Board will be ordered to adopt it, fully implement it, and put it into effect as of the opening of the 1971-72 school year, and at least initially to provide transportation for all students at grade levels 6-12 who desire to be transported. The Board's request that it be permitted to operate Dunbar as an all black or essentially all black school this year but with a reduced enrollment will be denied.

With further reference to the elementary schools, the decree will mandatorily enjoin the Board to disestablish completely effective as of the 1972-73 school year the existing system of racially identifiable elementary schools by means of pairing and grouping schools and assigning students to them so as to destroy their former racial identifiability.

In view of the fact that compliance with the decree will strain the District financially, the Court will not burden the Board additionally at this time by assessing any attorney's fee against it, but the District must pay the costs of this particular phase of the litigation.

Dated this 16th day of July, 1971.

/s/ J. SMITH HENLEY
United States District Judge

APPENDIX IV

Exhibit A

DESEGREGATION PLAN—UNGRADED PRIMARY AND GRADES 4 AND 5

(To Be Implemented on January 24, 1972)

The Eighth Circuit Court of Appeals, in a decree of September 10, 1971, held "that the District Court correctly decided that the School District was obligated to develop a unitary school system at the elementary level and to provide the transportation necessary to achieve that goal. In view of the serious delays which have already occurred in this matter, however, we do not believe that integration at the elementary level can be totally delayed until the beginning of the 1972-73 school year. A definite time schedule must be adopted and some progress must be made during the current school year."

This Court further stated "that pairing, clustering, the use of contiguous and non-contiguous zones, and the transportation of students are legitimate techniques to achieve the constitutional objectives of a unitary school system and that these and other techniques must be used here; that the burden on all students, black and white, should be as equitable as possible; . . ."

The Eighth Circuit Court of Appeals remanded the matter to the District Court with the following instructions: (1) to require the Board of Education to submit a plan for the establishment of a unitary system of elementary schools to the District Court no later than November 1, 1971; (2) to require the Board of Education to implement and to fully implement the plan no later than the beginning of the 1972-73 school year; (3) in the event the Board

of Education's plan does not maximize the unitization of the elementary schools for the current term within the fiscal and physical possibility, and the plan does not fully establish a unitary school system no later than the beginning of the 1972-73 school terms, the Court shall take such action as is necessary to achieve those objectives, including modifying the plan or devising alternatives thereto; (4) to require the Board of Education to make the necessary provisions in the budget now being prepared for the 1972-73 school year for all costs incidental to the integration of the school system; (5) to require the Board of Education to take immediate steps to arrange for the transportation necessary under the plan, and to make application for such state or federal funds as may be available for such purposes; and (6) to require that in the interim between the District Court's approval of a plan for the operation of the schools for the 1972-73 school term and the beginning of that term, the Board of Education submit to the District Court every 60 days a report of its progress toward the implementation of the approved plan.

In developing a plan to further desegregate the ungraded primary and Grades 4 and 5 in the Little Rock Public Schools, it should be pointed out that a considerable degree of desegregation is already in evidence in these grades. The Eighth Circuit Court of Appeals said in its opinion of September 10, 1971, that "Little Rock has a long history of maintaining two sets of elementary schools in a single school system, deliberately operated to separate pupils solely on the basis of race." The facts of the matter are that every sixth-grade pupil in the Little Rock School System is attending a school with precise racial balance and of the remaining eleven thousand elementary pupils in grades one-five, less than two thousand of them are attending schools of only one race.

The Little Rock Public Schools ungraded primary and grades 4 and 5 are presently comprised of 47.7 percent

black students and 52.3 percent white students. The school population in the eastern part of the district is predominantly black, in western Little Rock predominantly white, and a relatively small area in the central part of the district is desegregated.

All who have any knowledge of the location of schools and the prevailing housing patterns in the district realize that racial balance in each elementary school or even more than token desegregation in the schools located in the eastern and western geographical extremes can be achieved only through cross-town busing of students. The courts, as well as the parents of elementary children who permit their students to be transported across the city to achieve racial balance, should understand that the following conditions concerning student transportation would prevail:

1. Forty percent of all elementary students in the district would be transported to schools more than five miles from their homes.

2. An additional fleet of forty school buses would be required to transport four thousand elementary students, assuming that the buses would be available.

3. Forty buses contracted at a per-bus annual rate of $6,300 would cost the district $252,000. Less than 50 percent of this cost, or approximately $115,000, would be financed by the state according to the present level of state financing. The remaining $137,000 would come from local tax funds. This amount added to the $180,000 now required from local funds to transport secondary school students to achieve racial balance would reduce the district's operating budget by $317,000 for the 1972-73 school year.

4. The buses would be traveling on thoroughfares in the city during times when those traffic arteries would be most congested.

5. Since the bus companies now serving our district continue to experience difficulties in securing qualified bus drivers, the employment of forty additional drivers would be difficult if not impossible.

The following facts and projections concerning student enrollment in the Little Rock School District should be noted:

1. Since the most recent court order on elementary school desegregation, our district's enrollment at that level has decreased 535 students. A gain of 70 black students indicates a loss of 605 white students.

2. Black students comprise 47.7 percent of the enrollment in the ungraded primary and grades 4 and 5. Student enrollment in the first grade is predominantly black (57.9 percent) for the first time in the history of the district.

3. Incorporation of a massive transportation program to implement pupil assignment for racial balance in each of the elementary schools will, in our opinion, cause the elementary enrollment to rapidly become predominantly black because:

a. More parents of white elementary students will enroll their students in available private elementary schools.

b. Parents of white elementary school students will not move into our district and many presently located here will move away.

c. The establishment of a "cottage" type elementary education program is being freely discussed in western Little Rock. Under this plan parents in a given neighborhood would employ a certified teacher to instruct a group of elementary-age children in one of their homes. No certification re-

quirements would be violated since extensive materials, supplies, and equipment are not demanded at this level of instruction. These children could enter the public schools at the appropriate grade level at any time by demonstrating acceptable academic proficiency.

4. The present desegregation situation in the Little Rock School District is amazingly similar to that which existed in Norfolk, Virginia, during the 1970-71 school year. Compulsory transportation of elementary children in Little Rock to accomplish the degree of racial desegregation required by court orders will in all likelihood cause our elementary school enrollment to become predominantly black. (Newspaper article attached.)

Since children have been removed from their neighborhoods in the secondary school, an apparent decrease in parental interest and participation is in evidence. A similar result to a much greater degree can be predicted at the elementary level.

Citizen cooperation or acquiescence has been acceptable during our desegregation procedures thus far, but the possibility of gaining any additional financial support for our schools through referendum in the near future is nonexistent.

The "tipping point" in racial percentages has perhaps already been reached in the Little Rock School District. With racial balance through transportation of students at the elementary level mandated by the courts, the student enrollment at that level will doubtless be predominantly black. From that point our schools will rapidly resegregate as has happened in Atlanta, Georgia, where the public schools are now 70 percent black.

The Little Rock School District Board of Directors and administration will follow the law as interpreted by the

courts. We wish to make it known to the courts, however, that a massive transportation system that forces children, both black and white, from ages 6-11 to be transported across the city in congested traffic twice each day for the sole purpose of racial desegregation will decimate, if not destroy, an educational program that has been one of the best, if not the best, in the State of Arkansas.

For the reasons given above, we submit that a free transfer plan within the framework of available space as identified in the following tables is the only avenue of desegregation in the ungraded primary and grades 4 and 5 that will achieve desegregation without the threat of resegregation.

This plan would permit elementary school students to transfer at the beginning of the second semester from a school where their race is in a majority to one where their race is in a minority with transportation furnished by the school district. These students could transfer to any of the following schools where space is available without displacing students who now attend those schools.

I. Majority White Elementary Schools

School	Student space available	Present racial percentages	
		Black	White
Brady	98	15.9	84.1
Forest Park	75	11.1	88.9
Jefferson	17	7.8	92.2
McDermott	25	8.6	91.4
Meadowcliff	166	.1	99.9
Oakhurst	41	7.1	92.9
Romine	86	21.3	78.7
Terry	43	7.2	92.8
Williams	132	13.8	86.2
Wilson	34	5.9	94.1
Woodruff	32	29.4	70.6

II. Majority Black Elementary Schools

School	Student space available	Present racial percentages	
		Black	White
Gibbs	145	96.3	3.7
Granite Mountain	39	100.00	-0-
Ish	79	99.4	.6
Kramer	146	64.3	35.7
Rightsell	97	98.9	1.1
Stephens	36	94.8	5.2
Washington	57	100.0	-0-

The additional students as indicated above would cause each receiving school to have no more than an average of twenty-five students per classroom.

The plan will be implemented on January 24, 1972. Parents of all eligible students will be contacted in December and will be encouraged to transfer their children to one of the schools where their race is in a minority. Adequate transportation service for these students will be secured by the district in January, 1972.

ARKANSAS GAZETTE, Mon., Oct. 11, 1971. 11A

BUSING PLAN FOR RACIAL BALANCE FRUSTRATED

(c) New York Times News Service

NORFOLK, Va.—A court-ordered plan to achieve racial balance in Norfolk's public schools through large-scale, crosstown busing of pupils apparently has been frustrated.

The initial problem was to promote as much integration of the races as possible—a goal endorsed in principle both by Vincent J. Thomas, chairman of the Norfolk School Board, and lawyers for the NAACP, who for 15 years have been pressing the federal courts for greater and greater degrees of race-mixing in the city's schools.

Finally, this year, the courts ordered into effect a plan embodying the most direct and obvious means of achieving maximum integration. It required that the city-wide ratio of 55 per cent white students to 45 per cent black students be duplicated as nearly as possible, through busing, in each of Norfolk's 73 schools. Under the plan, nearly half the city's 50,000 school children would attend schools outside their neighborhoods.

The plan has been in effect for several weeks, and it is evident that its goal of across-the-board racial balance has been mocked by factors apparently not given much weight by the courts.

Quite simply, so many white parents appear to have pulled their children out of the public schools—despite School Board pleas to support the arrangement—that the carefully and intricately drawn integration plan apparently has been severely undercut.

Some of the parents have fled to the neighboring suburb of Virginia Beach, but realtors and school officials here believe that most have put their children in private schools.

Consequently, according to figures supplied by the School Board, the student body is predominantly black in 28 of the city's 58 elementary schools, or almost half of them, and in three of its 15 junior and senior high schools. In 14 of the elementary schools the proportion of black pupils ranges from 60 to 80 per cent.

In all, the School Board reports, 21 per cent of the city's white students have disappeared from its public schools since a more limited busing policy went into effect during the 1970-71 school year.

The Board says that 15 percent left the system this year. Instead of 55 per cent white and 45 per cent black, the school system's racial balance is now estimated at about 50-50.

The loss of the white students is "unacceptable, damn it. Constitution or no," says Thomas, who long has feared that Norfolk would follow other cities in losing many of its white, middle-class students to the private schools and suburbs.

"The people we're losing are the affluent, the articulate, some of the leaders," Thomas asserts. "I'm afraid of what it's going to do to public education over the long run. We had stabilized this city's school system, and that's no mean feat. Now it's completely unstable."

"My theme," Thomas said, "is that people are never going to understand the busing of small children."

Exhibit B.

DESEGREGATION PLAN
UNGRADED PRIMARY AND GRADES 4 AND 5

(To be implemented in 1972-73)

In developing a plan to further desegregate the ungraded primary and grades 4 and 5 in the Little Rock Public Schools, it should be pointed out that a considerable degree of desegregation is already in evidence at these levels. The Eighth Circuit Court of Appeals said in its opinion of September 10, 1971, that "Little Rock has a long history of maintaining two sets of elementary schools in a single school system, deliberately operated to separate pupils solely on the basis of race." The facts of the matter are that every 6th grade pupil in the Little Rock System is attending a school with precise racial balance, and of the remaining 11,000 elementary pupils in the ungraded primary and grades 4 and 5, less than 2,000 of them are attending schools of only one race.

In connection with this plan, we propose to eliminate or cast out each school that currently has a degree of desegregation in excess of 20% except when a school is involved in the pairing concept. This procedure would eliminate from this plan the following schools:

School	Percent White	Percent Black
Garland	54.4	45.6
Kramer	35.7	64.3
Parham	36.1	63.9
Romine	78.7	21.3
Woodruff	70.6	29.4

In addition to the above, we also propose to cast out Forest Park, Fair Park, Franklin, Stephens, and Oak-

hurst. The pairing concept will be used to desegregate these five schools on the following basis:

Forest Park) Fair Park)	Ungraded primary serving present zones plus Stephens zone.
Stephens—	Grades 4-5 serving present zone plus Forest Park and Fair Park zones.
Franklin—	Ungraded primary serving present zone plus Oakhurst zone.
Oakhurst—	Grades 4-5 serving present zone plus Franklin zone.

We propose to close Pfeifer Elementary School and redistribute this small student body to other elementary schools.

The racially-balanced zones created by pairing (Forest Park, Fair Park, Franklin, Stephens, and Oakhurst) will, when combined with two of the schools that were cast out because of existing racial balance (Garland and Woodruff), create a racially-balanced area in the central city that will divide the remaining elementary schools into eastern schools and western schools (see map).

All elementary school buildings west of this racially-balanced zone will house the ungraded primary and grade 4 and all elementary school buildings east of this racially-balanced zone will house the ungraded primary and grade 5.

East (Ungraded Primary and Grade 5)	West (Ungraded Primary and Grade 4)
Mitchell	McDermott
Gibbs	Terry
Ish	Jefferson
Rightsell	Williams
Washington	Brady
Gillam	Wilson
Granite Mountain	Western Hills
Carver	Meadowcliff

The present zone lines for elementary schools will remain fixed with the exception of the geographic zones designated for Centennial Elementary School and Pfeifer Elementary School. The phased-out Centennial zone will be annexed to other contiguous zones and the Pfeifer zone will be eliminated and annexed to another contiguous zone or to other contiguous zones.

This plan does not envision any school-provided transportation in the ungraded primary except where schools are paired and pupils attending those paired schools are required to attend in a building more than two miles from the pupil's residence. It does purport to transport at school district expense all 4th and 5th grade pupils living more than two miles from the school to which assigned who have been required to go from east to west for fourth grade work and from west to east for fifth grade work.

When any elementary school, by virtue of majority to minority transfer and/or by changes in housing patterns, achieves the required 20 percent desegregation, it shall be dropped from the criss-cross of 4th and 5th grades. On the other hand, if a school now cast out of the plan on the basis of 20 percent desegregation fails to maintain the established requirement of 20 percent, it shall be required to participate in the criss-cross of 4th and 5th grades. In each case, the change will be effective at the beginning of the school year following the achievement of 20 percent or loss of 20 percent.